No. 81-2384

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In the Supreme Court of the United States

OCTOBER TERM, 1982

GENERAL LONGSHORE WORKERS, ILA, LOCALS 1418 AND 1419, PETITIONERS

v.

FALLON W. BENTZ, ACTING REGIONAL DIRECTOR OF THE FIFTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court, having ordered that certain royalty payments required under a collective bargaining agreement between the union and a shipping association be deposited into the registry of the court pending a determination by the National Labor Relations Board as to the legality of the royalty provisions, abused its discretion by returning the deposited monies to the employers who had paid them, upon the Board's determination that the royalty provisions violated Section 8(e) of the National Labor Relations Act.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a) is unreported. The orders of the district court (Pet. App. 2a-28a) are unreported. The Decision and Order of the National Labor Relations Board are reported at 235 N.L.R.B. 161.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1982 (Pet. App. 1a). The petition for a writ of certiorari was filed on Monday, June 28, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act, Section 10(*l*), 29 U.S.C. 160(*l*), is set forth at Pet. 2.

STATEMENT

1. The Panama City Port Authority filed unfair labor practice charges with the National Labor Relations Board ("NLRB") alleging that certain royalty provisions[1] in petitioners' 1974 to 1977 collective bargaining agreement with New Orleans Steamship Association ("NOSSA"), violated Sections 8(b)(4)(A) and (B) and 8(e), the "secondary boycott" and "hot cargo" provisions, of the National Labor Relations Act (the "Act"), 29 U.S.C. 158(b)(4)(A) and (B) and 158(e). Upon finding reasonable cause to believe that the charges were true, the Board's Acting Regional Director for the Fifteenth Region petitioned the district court for preliminary injunctive relief under Section 10(*l*) of the Act, 29 U.S.C. 160(*l*). The district court, agreeing that there was "reasonable cause" to believe that petitioners were in violation of the Act, entered an order enjoining petitioners from enforcing the disputed royalty provisions (Pet. App. 27a). The district court subsequently modified its original injunction by permitting the royalties to be collected, subject to their being deposited into the registry of the court "pending final determination of this matter by the Board" (Pet. App. 20a). This modification was made in response to the contention by petitioners and NOSSA that, absent actual collection of the royalties, their ability to recover the funds in the event that the Board found the contested contractual provisions to be lawful could not adequately be preserved. They also represented that, "[i]f [petitioners] do not prevail [before the Board], the money can be returned with interest to those who have paid it," and that "the sums of money paid monthly would all be available to [the payors] at the

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[1]The provisions are set out at Pet. App. 23a-24a.

end of this litigation should the result be favorable to the NLRB" (Pet. App. 15a).

2. Following the injunction proceedings, the parties litigated before the Board the legality of the royalty provisions. The Board's Administrative Law Judge ("ALJ") concluded that petitioners, by maintaining and giving effect to the royalty provisions, violated Section 8(e) of the Act, and recommended that petitioners be ordered to cease and desist from maintaining, giving effect to, enforcing, or reaffirming the contested royalty provisions to the extent found unlawful. *General Longshore Workers, ILA Local No. 1418*, 235 N.L.R.B. 161, 170 (1978). The ALJ, however, rejected a further remedy sought by the General Counsel, namely, that petitioners be ordered to reimburse the payors of the royalties for the amounts that had been paid pursuant to the unlawful contractual provisions. The ALJ held that such a remedy was inappropriate since "the royalties paid by these employers were not involuntarily exacted from them by unlawful means but were sanctioned by the contract to which they voluntarily agreed." *Id.* at 170 n.23. The Board adopted the ALJ's decision and his recommended order. *Id.* at 161.

3. Following issuance of the Board's order, further proceedings were held in the district court to distribute the escrowed royalty payments. By order of April 5, 1979 (Pet. App. 18a), the district court vacated the Section 10(*l*) injunction as subsequently modified, ordered that the escrowed funds be paid "to those persons who incurred the expense of the unlawful royalty," and referred the matter to a Magistrate acting as a Special Master, pursuant to Rule 53, Fed. R. Civ. P., to determine "the persons who incurred the expense of the unlawful royalty, the amount thereof as to each such person, and to file a report and recommendation with respect thereto." The district court rejected the contention, made by petitioners and NOSSA, that the

funds should be paid to the NOSSA-ILA pension fund as called for by the collective bargaining agreement. In this regard, the court explained that the escrow account had been established as "an exercise of the court's equitable powers to protect the interests of all parties, pending the Board's adjudication" and that distribution of the deposited amounts to the pension fund would "defeat the purpose of [the escrow] order" (Pet. App. 16a). The court also noted that petitioners and NOSSA, in seeking an escrow arrangement in lieu of an outright ban on collection of the payments, had "asserted that in the event the Board found the royalty unlawful, the funds should be returned to those who paid them" (*ibid.*). Finally, the district court rejected the contention that the NLRB had before it the issue of reimbursement of the registry funds and had decided not to grant such relief, stating that "the court does not construe [the ALJ's ruling concerning reimbursement] as applicable to the funds deposited in the registry of the court" (Pet. App. 17a).

Following additional proceedings before the Special Master, the district court adopted the Special Master's proposed schedule of distribution and entered judgment accordingly (Pet. App. 2a-8a, 9a-12a).[2] The court of appeals affirmed (Pet. App. 1a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. The issue presented involves a matter entrusted to the broad discretion of the district court and presents no occasion for further review by this Court.

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[2]The judgment provided for the distribution of a principal sum of $1,095,119.80, plus accumulated interest of $14,584.28 (Pet. App. 10a-11a).

1. Section 10(*l*) of the Act embodies the congressional determination that certain unfair labor practices, principally secondary boycotts and "hot cargo" agreements, engender such serious interruptions of commerce that they should be discontinued pending final adjudication by the Board in order to avoid irreparable injury to the policies of the Act. S. Rep. No. 105, 80th Cong., 1st Sess. 8, 27 (1947); *Union De Tronquistas De Puerto Rico* v. *Arlook*, 586 F. 2d 872, 876 (1st Cir. 1978); *Squillacote* v. *International Brotherhood of Teamsters*, 561 F. 2d 31, 35 (7th Cir. 1977); *Wilson* v. *Milk Drivers & Dairy Employees Union, Local 471*, 491 F. 2d 200, 203 (8th Cir. 1974). Therefore, in that section, Congress imposed upon the Board's Regional Directors a duty to seek injunctive relief in the appropriate district court upon a reasonable belief that a violation has occurred, and empowered the court to grant such injunctive relief as it deems "just and proper." In framing such relief, the court retains a measure of equitable discretion, *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944), and its actions may be reversed only upon a showing of abuse of discretion. *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931-932 (1975); *Brown* v. *Chote*, 411 U.S. 452, 457 (1973).

Petitioners contend that the district court exceeded its authority under Section 10(*l*) by awarding "affirmative monetary relief following a final decision on the underlying unfair labor practice by the NLRB which had denied the same relief" (Pet. 6). According to petitioners, since Section 10(*l*) was "only intended to provide temporary injunctive relief pending final adjudication by the NLRB," the district court "should have held the funds in its registry *solely* for the purpose of ensuring that those funds were available to be distributed in accordance with the mandate of the NLRB" (Pet. 8-9; emphasis in original). There is no merit to this contention.

It is undisputed that the district court, having found reasonable cause to believe that the royalty provisions violated Section 8(e) of the Act, had the power under Section 10(*l*) to enjoin, as it did initially, collection of the royalty payments outright pending a final Board determination of the legality of those provisions. In that event, upon issuance of the Board's decision finding that the royalty provisions violated Section 8(e), petitioners would not have been entitled to collect royalty payments from the employers for the period prior to the Board's decision. Section 8(e) provides that agreements proscribed by that section shall be "unenforceable and void." See *Kaiser Steel Corp.* v. *Mullins*, No. 80-1345 (Jan. 13, 1982), slip op. 10-13.

Petitioners should be in no better position merely because the district court, at their urging, modified its initial decision and instead provided that the royalties be paid into the court's registry pending the Board's determination. Thus, following the Board's decision that the royalty provisions were unlawful, the district court reasonably exercised the equitable discretion it possesses under Section 10(*l*) in deciding that the escrowed royalties should revert, not to the NOSSA-ILA pension fund, but to the persons who paid them. The district court thereby merely placed the parties in the same position that they would have been in had the collections initially been enjoined outright.[3] Indeed, had

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[3]Petitioners contend (Pet. 5 n.6) that, under the terms of the escrow agreement, the monies were to be returned to the payors only "if the Unions did not 'prevail' before the NLRB," and "the Unions did 'prevail' at the NLRB on the crucial issue of reimbursement." It is clear, however, that the district court, and indeed the parties, meant prevailing before the Board on the question whether the royalty provisions violated Section 8(e) of the Act, and petitioners did not win on that issue.

Nor is there merit to petitioners' contention (Pet. 9-10) that the district court's distribution of the escrowed funds to those who had paid them intruded upon the Board's exclusive jurisdiction. As the district

the court directed that the escrowed funds be paid to the pension fund it would have been enforcing and giving effect to the unlawful contractual provisions, in direct contravention of the Board's mandate.

2. Contrary to petitioners' contention (Pet. 11-12), this case is not closely related to *Shepard* v. *NLRB*, cert. granted, No. 81-1627 (May 17, 1982). The issue in *Shepard* is whether the Board properly exercised its Section 10(c), 29 U.S.C. 160(c), remedial authority in declining to grant a "make whole" remedy in the case of a Section 8(e) violation unaccompanied by restraint or coercion. The instant case does not involve the Board's remedial authority, but, rather, the propriety of the exercise of the district court's authority under Section 10(*l*) to grant such injunctive relief as is "just and proper."

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court correctly concluded (*supra*, page 4), the ALJ, in deciding not to order reimbursement of monies paid under the unlawful royalty provisions, was not purporting to determine what disposition should be made of funds which, pursuant to the court's order, had meanwhile been deposited in the court's registry. Moreover, the fact that the district court's power to continue a 10(*l*) injunction ended when the Board's decision issued does not mean that the court did not possess residual power to dispose of matters which remained from its prior exercise of jurisdiction. Just as the district court would have power to dissolve a previously issued 10(*l*) injunction, it would have power to decide what disposition should be made of an escrow fund ordered in lieu of an injunction.

Finally, contrary to petitioner's contention (Pet. 10-11), no issue concerning the proper standards for granting injunctive relief under Sections 10(j) and (*l*) of the Act, 29 U.S.C. 160(j) and (*l*) is presented here (cf. *McLeod* v. *General Electric Co.*, 385 U.S. 533 (1967)). As shown (*supra*, pages 5-6), the issuance of a 10(*l*) injunction was clearly appropriate here; the only question is whether the district court abused its equitable discretion in disposing of an escrow fund that was ordered in lieu of an injunction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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